WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

VIA ECFS ***EX PARTE***

April 14, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A325
Washington, DC 20554

Re: *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island,* WC Docket No. 08-24; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area,* WC Dkt. No. 08-49

Dear Ms. Dortch:

On March 26, 2009, a coalition of competitors, including One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc., filed in the above-referenced dockets a proposed standard for FCC consideration of incumbent LEC petitions for forbearance from unbundling obligations.[1] On behalf of One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc., please find attached a paper that provides factual and legal support for the proposed standard.

Please do not hesitate to contact me if you have any questions with respect to this submission.

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones
Jonathan Lechter
Nirali Patel

Attorneys for One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc.

Attachments

[1] *See* Letter from Andrew D. Lipman et al., Counsel for Alpheus Communications, L.P. et al. to Marlene H. Dortch, Secretary, FCC, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24; *In re Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Dkt. No. 08-49 (filed Mar. 26, 2009).

cc: Nick Alexander
Scott Deutchman
Jennifer Schneider
Mark Stone
Randy Clarke
Marcus Maher
Tim Stelzig
Don Stockdale
Julie Veach

FACTUAL AND LEGAL SUPPORT FOR COMPETITORS' PROPOSED UNE FORBEARANCE STANDARD

On March 26, 2009, a coalition of competitors[1] proposed a new standard (hereinafter "Proposed Standard")[2] for FCC (or "Commission") consideration of incumbent local exchange carrier ("incumbent LEC" or "ILEC") petitions for forbearance from the unbundling requirements of Section 251(c)(3)[3] of the Communications Act of 1934, as amended (the "Act").[4] The Proposed Standard is as follows:

> Petitions for forbearance from Section 251(c)(3) unbundling obligations filed pursuant to Section 10 of the Act[5] shall be considered on a Metropolitan Statistical Area ("MSA") basis. In determining what level of competition in the MSA is sufficient under Section 10, the Commission should determine, for each MSA in which forbearance is sought, whether there are
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> (1) at least two facilities-based non-ILEC wireline competitors in the wholesale loop market, each of which has actually deployed end-user connections to 75 percent of end-user locations, each of which has deployed wholesale operations support systems sufficient to support the wholesale demand in the relevant product market, and each of which has garnered at least 15 percent of wholesale loop market share in the relevant product market ("Wholesale Test");
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> or
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> (2) at least 75 percent of end-user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the relevant downstream product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based

[1] This coalition includes, among other companies, Cbeyond, Inc. ("Cbeyond"), Integra Telecom, Inc. ("Integra"), One Communications Corp. ("One Communications"), and tw telecom inc. ("tw telecom") (collectively, the "Joint Commenters").

[2] *See* Letter from A. Lipman et al., Counsel for Alpheus Communications, L.P. et al. to Marlene H. Dortch, Secretary, FCC, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24; *In re Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Dkt. No. 08-49 (filed Mar. 26, 2009).

[3] *See* 47 U.S.C. § 251(c)(3) (imposing on incumbent LECs the duty to provide "nondiscriminatory access to network elements on a unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory").

[4] *See generally* Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[5] 47 U.S.C. § 160(c).

> competitors to the ILEC that have each garnered at least 15 percent of retail market share in the relevant product market ("Retail Test").
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> In extraordinary circumstances, the FCC may depart from this standard and reach a different conclusion as to whether to grant or deny a petition for forbearance from unbundling obligations than would otherwise apply under this standard.

This paper provides factual and legal support for the Proposed Standard. Specifically, Part I of this paper explains why the FCC's existing analytical framework for considering petitions for forbearance from unbundling obligations is flawed and must be replaced. Part II explains the logic underlying the salient features of the Proposed Standard. Finally, Part III applies the Proposed Standard to Verizon's pending petition for forbearance from unbundling obligations in Rhode Island.[6]

I. PROBLEMS WITH THE ANALYTICAL FRAMEWORK THE FCC HAS USED TO REVIEW INCUMBENT LEC UNE FORBEARANCE PETITIONS.

In previous orders addressing ILEC petitions for forbearance from unbundling requirements, the FCC has failed to conduct a coherent competition and consumer welfare analysis in several ways. *First*, the FCC has failed to utilize appropriate and consistent geographic markets. For instance, the FCC has examined network coverage on a wire center basis in its unbundled network element ("UNE") forbearance orders. In the *Omaha Order*, the FCC granted forbearance in those wire centers where, among other things, Cox's voice-enabled cable plant covered at least 75 percent of the end-user locations that were accessible from those wire centers.[7] But in other contexts, the FCC has concluded that competitors' entry occurs on a much larger geographic scale than wire centers, such as MSAs. For example, the Commission considers requests for special access pricing flexibility on an MSA basis because it has found that "MSAs best reflect the scope of competitive entry, and therefore, are a logical basis for measuring the extent of competition."[8] Competitive local exchange carriers ("CLECs"), the purchasers of loop and transport facilities, therefore demand those facilities in a much larger geographic area than wire centers.[9] As explained in Part II.A, if a competitor cannot obtain loop

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[6] *See* Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Dkt. No. 08-24 (filed Feb. 14, 2008).

[7] *See, e.g., In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶ 62 (2005) ("*Omaha Order*"); *see also Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting Qwest Corporation Forbearance Relief in the Omaha Metropolitan Statistical Area*, Public Notice, 22 FCC Rcd. 13561, DA 07-3376, at 2 (2007) ("*Cable Coverage Threshold Disclosure Public Notice*") (disclosing 75-percent network coverage threshold).

[8] *In re Access Charge Reform et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶ 72 (1999) ("*Pricing Flexibility Order*").

[9] *See infra* Part II.A.

or transport facilities throughout the area necessary to achieve minimum viable scale, the competitor may not be able to sustain its presence in the market, even in the wire centers where UNEs are available.

Second, the FCC has failed to conduct a separate assessment of the extent of competitors' network deployment in different relevant product markets. Most obviously, the FCC has not distinguished between residential and business markets. Instead, it has examined the extent to which competitors have deployed loop facilities to 75 percent of *all* end-user locations, without distinguishing between business and residential end-user locations. That is, the Commission has relied on aggregate data regarding cable network coverage for both residential and business customers[10] even though aggregate data offers no reliable indication of a cable operator's network coverage for either the circuits demanded by residential customers or those demanded by business customers. As a result, the FCC granted forbearance throughout nine Qwest wire centers in the Omaha MSA and five wire centers in the Anchorage study area even though it was not at all clear that the incumbent cable provider's network covered 75 percent of the *business* end-user locations in those wire centers.[11]

Third, the FCC has failed to assess market share separately in relevant product markets. Most obviously, the Commission has failed to account separately for market share in the residential and business markets. Instead, the Commission has examined residential market share only and essentially relied on competitors' success in that market as the basis for predicting that competitors will achieve the same level of success in the business market. In the *Omaha Order*, the Commission predicted that "in light of the record evidence of Cox's strong success in the mass market . . . Cox poses a substantial threat to Qwest for higher revenue enterprise services as well."[12] There was no evidence in the record, however, that Cox was serving *business* customers that demand high-capacity loop and transport facilities to any significant degree. In fact, the FCC ignored retail business market share evidence submitted into the record by Cox and never analyzed Cox's actual retail market share for business customers served by the high-capacity loop and transport facilities at issue. Moreover, in contravention of its prediction, the FCC had already acknowledged that many cable companies had captured more than fifty percent of the residential broadband customers across the country without achieving similar success in the business market, especially among those customers served by high-capacity loops.[13]

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[10] *See, e.g., Omaha Order* ¶ 69; *see also In re Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 1958, ¶ 32 (2007) ("*Anchorage Order*").

[11] *See id.*

[12] *Omaha Order* ¶ 66.

[13] *See In re Petition for Forbearance of the Verizon Tel. Cos. Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) et al.*, Memorandum Opinion and Order, 19 FCC Rcd. 21496, ¶ 22 & n.68 (2004).

There are several additional reasons why the FCC's reliance on cable companies' success in the mass market to predict future success in the business market is unreliable. To begin with, cable companies have benefited from several advantages in the residential market that they do not benefit from in the business market. These advantages include the following: (1) legacy relationships with residential customers in the provision of subscription video services; (2) economies of scope in the provision of IP voice services to residential customers; and (3) the ability to deploy end-user connections to essentially all residential customers at a time when cable companies enjoyed a protected (*de facto* or *de jure*) monopoly in the provision of subscription video services. As a result, even the most optimistic analysts predict that cable will achieve no more than 25 percent market share in the small business market.[14]

The FCC's reliance on facilities-based competitors' (namely, cable providers') success in the mass market to predict success in the business market is also flawed because the products and services offered by such competitors may not meet the demands of business customers. As the Joint Commenters have explained in their filings in several UNE forbearance proceedings, businesses generally do not view cable company offerings as substitutes to the DS0, DS1, and DS3-based services offered by CLECs,[15] and as the Commission itself has recognized, cable operators' "provision of services to enterprise customers are still in the initial stages."[16]

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[14] *See* Insight Research Corporation, *Cable Telephony: The Threat to Small Business ILEC Markets, 2007-2012*, Executive Summary, at 6 (rel. April 2007) (stating that cable operators will penetrate 25 percent of the total small enterprise market between 2007 and 2012); *see also* Raymond James & Associates, Inc., *Telecommunications Services Wireline Industry Report: Examining the Convergence of the Telecom and Cable Sectors*, at 9 (rel. Aug. 18, 2008) (stating that Comcast management is targeting a 20 percent share of the small and medium business market over the next several years).

[15] *See, e.g.,* Joint Opposition of Time Warner Telecom, Cbeyond, and Eschelon Telecom, *In re Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle MSAs*, WC Dkt. No. 07-97, at 31 (filed Sept. 13, 2007) ("As Richard Batelaan, Cbeyond's Chief Operating Officer, explains in his declaration, while Cbeyond faces competition from both ILECs and other facilities-based CLECs that rely on UNEs in the [small and medium enterprise] market, 'Cbeyond faces little, if any, facilities-based competition from cable operators or wireless companies.'"); *see id.* Attachment C, Declaration Of Richard J. Batelaan On Behalf Of Cbeyond, Inc., ¶ 5.

[16] *In re Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs*, Memorandum Opinion and Order, 22 FCC Rcd. 21293, n.116 (2007) ("*6-MSA Order*"). In addition, mobile wireless carriers do not appear to provide an effective substitute for residential wireline voice service. In a November 2008 report on the state of competition in the telecommunications industry, for example, the Department of Justice observed that "more than 80 percent of residential customers do not consider mobile wireless to be a substitute for a landline telephone at current access prices, since they continue to pay for and use both." U.S. Department of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers*, at 66 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/

Nor has the Commission conducted a meaningful analysis of competition in the wholesale market. Instead, the FCC has simply assumed that competition in the downstream retail market from a single intermodal facilities-based competitor would give the incumbent LEC the incentive to offer competitors access to the incumbent LEC's loops and transport on just and reasonable terms and conditions. Specifically, in the *Omaha Order*, the FCC predicted that competition in the mass market from Cox would prevent Qwest from curtailing wholesale access to its loop and transport facilities:

> [t]he very high levels of retail competition that do not rely on Qwest's facilities – and for which Qwest receives little to no revenue – [will] provide Qwest with the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest.

Omaha Order ¶ 67; *see also id.* ¶¶ 79-81. But the FCC has never attempted to determine whether there is any factual basis for this prediction. In fact, McLeodUSA Telecommunications' experience in the post-forbearance Omaha market indicates that the FCC's prediction was erroneous. Rather than offering reasonable wholesale pricing for DS0, DS1, and DS3 loops, Qwest has only offered McLeodUSA access to Qwest's loop facilities at special access rates.[17] As a result, McLeodUSA publicly announced that it would discontinue its operations in the Omaha MSA if the Commission does not modify the *Omaha Order*.[18] Moreover, as a direct consequence of McLeodUSA's difficulty in negotiating reasonable "commercial" pricing for voice-grade and high-capacity loops from Qwest, Integra abandoned its plans to enter the Omaha MSA.[19]

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reports/239284.pdf. But in all events, there would be no basis for predicting that wireless carriers can offer an effective replacement for *business* wireline voice and data services.

[17] *See* Petition for Modification of McLeodUSA Telecommunications Services, Inc., *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Dkt. No. 04-223, at 4 (filed July 23, 2007) ("McLeodUSA Petition"). These tariffed, special access rates are largely unregulated and substantially higher than cost-based rates for UNEs. According to McLeodUSA, Qwest's "demands include[d] prices increases in the range of 30% or more for monthly charges for DS0 stand alone loops, a minimum increase of 86 % for DS1 access loops, and a 360% increase in associated non-recurring charges for installing DS1 access loops." *Id*. at i.

[18] *See* McLeodUSA Petition at 14 ("The nine affected wire centers represent the vast majority of revenue opportunity of McLeodUSA's current and prospective customer base. Accordingly, McLeodUSA is being forced to exit all Omaha wire centers because there is simply not enough revenue potential in the unaffected Omaha wire centers to justify the ongoing operating costs of the local switching center and related expenses.").

[19] Comments of Integra Telecom, Inc., *In re Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Dkt. No. 06-172, at 4-5 (filed Mar. 5, 2007).

In the subsequent *Anchorage Order*, the FCC required petitioner ACS to offer loop facilities in the Anchorage study area at rates equivalent to those negotiated between ACS and the incumbent cable operator, GCI, in the Fairbanks, Alaska market until parties negotiated separate rates for Anchorage.[20] The Commission imposed this rate regulation or "competitive backstop"[21] as a condition of granting forbearance *precisely because* of arguments made by McLeodUSA regarding its inability to obtain loops and transport at reasonable rates in the Omaha market. Specifically, the Commission held that "[w]e believe this condition adequately addresses issues raised by McLeodUSA."[22] The FCC thus implicitly acknowledged that it erred in simply assuming that competition in the downstream retail market from a single cable operator would give Qwest the incentive to offer competitors in Omaha access to its loops and transport at rates that are low enough to allow CLECs to continue to compete. Yet, the Commission has never explicitly disavowed the predictive judgment it made in the *Omaha Order*.

Fourth, the FCC has failed, in general, to ensure that forbearance does not yield a post-forbearance duopoly in which the incumbent LEC and cable operator have the incentive and ability to sustain prices at supra-competitive levels. As mentioned above, in the *Anchorage Order*, the FCC implicitly conceded that granting forbearance from unbundling in a market in which only one non-ILEC competitor has deployed its own loops on a widespread basis would lead to a duopoly and unreasonably high wholesale rates for loops.[23] The FCC therefore conditioned its grant of forbearance on ACS' continued obligation to offer loops in Anchorage at the rates it charged under a commercial agreement that applied in Fairbanks.[24] The Fairbanks rates were approximately 2 percent and 19 percent higher than UNE rates for DS1 and DS0 facilities, respectively, in Anchorage.[25] Unfortunately, the FCC has failed to recognize that it is simply inappropriate to grant forbearance in a market where only a single competitor has deployed loop facilities to most end-user locations.

Fifth, in assessing the extent of facilities-based competition, the FCC has incoherently characterized as "facilities-based competitors" those competitors that rely on unbundled loops sold by incumbent LECs as well as those competitors that rely on resale. For example, while the

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[20] *Anchorage Order* ¶ 39.

[21] *Id.* ¶ 41.

[22] *Id.* n.134.

[23] *See id.* ¶¶ 40-42; *see also id.* ¶ 46 ("While we recognize . . . that most of the competition in the Anchorage study area comes from two competitors, the continuing obligation of ACS to provide unbundled access to loops at rates, terms and conditions under mutually agreeable rates, terms, and conditions – with an interim agreement no less favorable than that reached by ACS and GCI in Fairbanks – with [sic] permit other competitors to enter the market, thereby reducing the risk of anticompetitive conduct.").

[24] *See id.* ¶ 39.

[25] *See id.* n.133.

Commission explicitly found that there were no significant alternative sources of wholesale inputs for carriers in the Omaha market, it held that "Qwest's own wholesale offerings will continue to be adequate without unbundled loop and transport offerings."[26] In making this determination, the Commission relied in part on Qwest's offering of unbundled network element-platform ("UNE-P") replacement products.[27] Specifically, the Commission took into account the number of "residential [Qwest Platform Plus ("QPP")] arrangements (*i.e.*, combinations of DS0 loops, switching, and shared transport)"[28] as well as the number of "business QPP arrangements."[29] But the Commission cannot logically rely on competition that, by definition, relies on an incumbent LEC's unbundled loops as a basis for eliminating the very same unbundled loops.[30] And while the FCC subsequently held in the *6-MSA Order* that "competition that relies on Verizon's own facilities is *not* a sufficient basis to grant forbearance from UNE requirements,"[31] it nevertheless included "competitive lines provisioned via Qwest's UNE-P replacement service in [its] market share calculations" for facilities-based competitors in the *4-MSA Order*.[32]

As it did in the *Omaha Order*,[33] the Commission also treated resale-based competition as equivalent to facilities-based competition in the *4-MSA Order*.[34] But resale-based competition

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[26] *Omaha Order* ¶ 67.

[27] *See id.* ¶¶ 67-68.

[28] *Id.* ¶ 67; *see also* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Dkt. No. 07-97, n.23 (filed Apr. 27, 2007) ("QPP/QLSP includes unbundled loops").

[29] *Omaha Order* ¶ 68.

[30] It is also worth noting that, just as the availability of UNEs constrains special access pricing (as the Commission explicitly recognized in the *TRRO* (*In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶¶ 64-65 (2004) and the *6-MSA Order* (¶ 42)), the availability of DS0 unbundled loops constrains the price of UNE-P replacement products that include DS0 unbundled loops (such as Qwest's QPP/QLSP products and Verizon's "Wholesale Advantage" product). Because these products combine UNE loops and non-UNE switching and transport, if the ILEC were to significantly increase the price of the UNE-P replacement product, such an increase may provide prospective purchasers with an incentive to purchase only DS0 unbundled loops and supply their own switching capability instead.

[31] *6-MSA Order* ¶ 42 (emphasis added).

[32] *In re Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle MSAs*, Memorandum Opinion and Order, 23 FCC Rcd. 11729, n.64 (2008) ("*4-MSA Order*").

[33] *See Omaha Order* ¶¶ 67-68.

[34] *See 4-MSA Order* n.64.

cannot be included in the Commission's calculation of competitors' market share because it is also competition that relies on the incumbent LEC's own facilities.

Moreover, resale-based competition is qualitatively different from, and yields far fewer consumer benefits than, UNE-based competition. To begin with, resellers have essentially no ability to innovate by offering new services because they can only offer the services already made available by the incumbent LEC.[35] By contrast, UNE-based competitors can combine incumbent LEC loop or transport facilities with their own electronics to provide new and higher quality services such as integrated access DS1-based services. In addition, the "'retail-less-discount'" pricing of resale provides no constraint on incumbent LEC prices because higher incumbent LEC prices yield higher wholesale prices.[36] Thus, there is no basis for the FCC to include resale-based competition or competition that relies on UNEs in its forbearance analysis.

This flawed existing forbearance framework is likely to cause the FCC to grant petitions where the Section 10 standard is not met (*i.e.*, false positives) and even to deny petitions in some markets in which the Section 10 standard is met (*i.e.*, false negatives). The possibilities for false positive and false negative outcomes are legion, but some illustrative examples are as follows:

- **Example one.** By measuring competitors' network coverage for all end users without distinguishing between residential and business customers, the existing standard can yield the conclusion that there is sufficient network coverage in the business market when in fact there is not (*i.e.*, the high percentage of residential end-user locations covered masks the low percentage of business end-user locations covered). This conclusion can, in turn, cause the FCC to grant forbearance in the business market where there is insufficient competition to protect consumers and competition absent the availability of UNEs.

- **Example two.** By relying on the presence of a single facilities-based competitor as the basis for a speculative prediction that a wholesale market will develop for local

[35] *See, e.g., In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers*, First Report and Order, 11 FCC Rcd. 15499 ¶ 332 (1996) ("*Local Competition Order*") (finding that "carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail"); *see also* Gillan Associates, "The Irrelevance of Resale and RBOC Commercial Offers to Competitive Activity in Local Markets," May 2008, *In re Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle MSAs*, WC Dkt. No. 07-97, at 2 (filed May 15, 2008) ("Gillan Resale White Paper") (stating that "resale is nothing more than the re-offering of the retail service as designed by the incumbent" and that "[t]here is no meaningful ability for the purchasing carrier (that is, the reseller) to differentiate its product from that offered by the incumbent through innovation").

[36] *See* Gillan Resale White Paper at 2 ("[R]esellers can never impose a competitive constraint on the incumbent's prices . . . because the wholesale price moves up with any increase in the retail price. Consequently, the ILEC is able to simultaneously raise its rivals' costs in lock-step with any desired retail rate increase, effectively ensuring that rivals match – and, therefore, reinforce – the incumbent's rate increases.").

transmission facilities, the existing forbearance standard can cause the FCC to eliminate the only viable wholesale offers (*i.e.*, UNEs) for transmission facilities in a market. The result is a post-forbearance duopoly.

II. THE LOGIC UNDERLYING THE PROPOSED STANDARD FOR FCC REVIEW OF INCUMBENT LEC UNE FORBEARANCE PETITIONS.

The objective of the Proposed Standard is to remedy the flaws in the FCC's prior UNE forbearance orders while at the same time establishing a stable and generally predictable framework for the consideration of UNE forbearance petitions. The Proposed Standard accomplishes this goal by, among other things, (1) using a stable relevant geographic area (*i.e.*, MSAs) that is firmly rooted in an analysis of the competitive effects of eliminating access to UNEs; (2) allowing for distinct consideration of certain categories of products (*e.g.*, between wholesale and retail products and between products demanded by business customers and residential customers) while allowing for the possibility of further disaggregation by product type; and (3) allowing forbearance to be granted only where it is likely that the incumbent LEC will face meaningful competition from multiple (*i.e.*, at least two) competitors in a product market throughout the MSA.

A. Identifying The Relevant Geographic Area Under The Proposed Standard.

In formulating a new UNE forbearance standard, the FCC must first establish a stable and administrable geographic area for purposes of assessing UNE forbearance petitions. For transmission services in the telecommunications industry, the FCC has recognized that each point-to-point connection technically constitutes a separate geographic market.[37] Nevertheless, the Commission has recognized that "assessing market power in each individual point-to-point market would be administratively impractical and inefficient."[38] Therefore, the Commission has held that it is reasonable to aggregate point-to-point markets in certain circumstances.[39] Accordingly, where the competitive effects of eliminating regulation applicable to point-to-point circuits (such as the duty to provide UNE loops and transport facilities) would be felt in a broad geographic area, it is appropriate for the FCC to use that broader geographic area to analyze competition for purposes of determining whether it should retain the regulation.

In the case of the duty to provide UNEs, the competitive effects of eliminating such regulation would extend throughout greater metropolitan areas—areas that are most effectively

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[37] *See, e.g.*, *In re Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area et al.*, Second Report and Order in CC Docket No. 06-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd. 15756, ¶ 5 (1997) ("*LEC Classification Order*" or "*LEC In-Region Interexchange Order*") ("We define the relevant geographic market for interstate, domestic, long distance services as all possible routes that allow for a connection from one particular location to another particular location (*i.e.*, a point-to-point market).").

[38] *See id.* ¶ 66.

[39] *See id.*

captured by MSA boundaries. CLECs that purchase wholesale inputs to provide downstream retail services can generally achieve minimum viable scale only if they serve geographic areas that are roughly the size of an MSA or at least the size of an MSA. For example, One Communications determines the boundaries of the geographic areas it will serve based on several factors, including the minimum number of business locations that it must serve in order to recover the substantial fixed costs associated with market entry and to ultimately achieve profitability.[40] As explained by One Communications' Executive Vice President of Strategy, Russell Oliver, other factors include "not only the locations of businesses and office parks and the proximity of fiber and central offices to those businesses and office parks but the amount of driving time it takes for One Communications' sales associates and network engineers to reach customers, and the ability of those personnel to use the highway system to meet with customers and maintain One Communications' network."[41] One Communications has found that MSAs tend to reflect these driving and communications patterns.[42] In addition, many of One Communications' small and medium-sized business customers have multiple locations which are generally all located within the same MSA.[43] Based on its analysis of these factors, One Communications has determined that, "at a minimum, it must be able to serve the small and medium-sized businesses in approximately 70 to 80 percent of wire centers in an MSA in order to achieve profitability."[44] As a result, One Communications generally serves "areas that roughly approximately MSAs rather than subsets of MSAs."[45]

Similarly, according to Cbeyond's Chief Marketing Officer, Brooks Robinson, Cbeyond has found that in order to recover the substantial sunk costs associated with market entry and ultimately achieve profitability, its "network footprint in a geographic area must contain at least 30,000 locations associated with businesses between 5 and 249 employees."[46] It is also important that each of Cbeyond's serving areas are large and contiguous so that Cbeyond can, among other things, serve customers with multiple locations and implement its sales model, which is based on face-to-face consultations and field visits with existing and potential business

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[40] *See* Declaration of Russell Oliver on Behalf of One Communications Corp., ¶ 5 ("Oliver Declaration") (attached hereto as Attachment A).

[41] *Id.* ¶ 6.

[42] *Id.*

[43] *Id.* ¶ 5.

[44] *Id.* ¶ 7.

[45] *Id.* ¶ 8.

[46] Declaration of Brooks Robinson on Behalf of Cbeyond, Inc., ¶ 6 ("Robinson Declaration") (attached hereto as Attachment B).

customers.[47] As a result, "Cbeyond must serve an area that is at least the size of a Metropolitan Statistical Area."[48]

Accordingly, it makes sense to use a geographic area, such as an MSA, that is larger than a wire center to assess network coverage.[49] Significantly, the FCC *has* used MSAs as the geographic area for measuring *market share* in UNE forbearance proceedings.[50] In other contexts, the FCC has sensibly used the same geographic market to measure network coverage and market share.[51] Thus, the Commission should do the same in UNE forbearance proceedings.

For all of these reasons, the Proposed Standard utilizes MSAs as the relevant geographic area in which to assess UNE forbearance petitions. Under the Proposed Standard, incumbent LECs would be required to seek forbearance from Section 251(c)(3) unbundling requirements in one or more MSAs. Incumbent LECs would not be allowed to deviate from utilizing MSAs as the relevant geographic area except in extraordinary circumstances.

B. Identifying Relevant Product Markets Under The Proposed Standard.

The FCC must also establish stable and administrable product markets for purposes of assessing UNE forbearance petitions. To begin with, it is important for the FCC to recognize that the retail and wholesale markets constitute separate product markets. The Commission has already implicitly acknowledged the importance of doing so in wireline merger orders by conducting separate analyses of the market for wholesale special access services[52] as distinct

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[47] *Id.* ¶ 6.

[48] *Id.*

[49] While the Joint Commenters have argued in the past that a wire center was sufficient as a geographic market for assessing network coverage, they have reassessed their position in light of the need for competitors to achieve minimum viable scale in order to enter a geographic area.

[50] *See, e.g., 4-MSA Order* ¶ 27 ("The record evidence does not reflect that *in any of the four MSAs* do the cable operators, even in the aggregate, have more than a [REDACTED] percent share of the market for mass market telephone services *in an MSA*.") (emphasis added); *see also 6-MSA Order* ¶ 37 ("the record evidence indicates that competition from cable operators *in the 6 MSAs* currently does not present a sufficient basis for relief") (emphasis added).

[51] *See, e.g., In re Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶¶ 22, 57-62, 67-72 (1995) (using "'a single national relevant geographic market[]'" to assess market share and supply elasticity in the interstate domestic, interexchange services market) (internal citation omitted); *In re Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd. 13967, Appendix C ("*Sprint-Nextel Merger Order*") (analyzing both market share and network coverage in "seven specific markets of potential concern" on a Basic Trading Area ("BTA") basis).

[52] *See In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of* Control, Memorandum Opinion and Order, 20 FCC Rcd. 18290, ¶¶ 24-55 (2005) ("*SBC-AT&T*

from the downstream services for which such wholesale services are inputs.[53] In other contexts, such as assessments of competitive market conditions in the satellite industry, the Commission has also implicitly and explicitly acknowledged the significance of examining competition in wholesale and retail product markets separately.[54] Moreover, international regulators have also expressly held that a distinction should be made between retail and wholesale markets in assessing market power.[55]

This approach is justified in UNE forbearance proceedings because of the stark differences between wholesale and retail markets. The wholesale products at issue are stand-alone voice-grade DS0 loops, conditioned copper loops, DS1 loops, DS3 loops as well as DS1 and DS3 transport. The retail products at issue are the downstream services provided *via* these wholesale facilities, a set of products that ranges from telephone services to xDSL broadband services to Ethernet services. The absence of sufficient competition in the provision of

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Merger Order"); *In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶¶ 24-55 (2005) ("*Verizon-MCI Merger Order*"); *In re AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, ¶¶ 27-33 (2007) ("*AT&T-BellSouth Merger Order*").

[53] *See, e.g.*, *SBC-AT&T Merger Order* ¶¶ 56-80 (analyzing competitive effects of the proposed merger on retail enterprise services); *Verizon-MCI Merger Order* ¶¶ 56-81 (same); *AT&T-BellSouth Merger Order* ¶¶ 62-87 (same).

[54] *See In re Second Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, Second Report, 23 FCC Rcd. 15170, ¶¶ 28-29 (2008) ("differentiat[ing] the relevant product markets between wholesale and retail markets" and analyzing competition "in an aggregated market for domestic wholesale satellite services"); *In re Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, First Report, 22 FCC Rcd. 5954, ¶ 33 (2007) ("We examine several relevant markets, including 'wholesale' (in which the product is capacity, an input to a service provided to business or retail consumers) and 'retail' (in which the product is a service provided to consumers)."); *In re Constellation, LLC et al., Transferors and Intelsat Holdings, Ltd., Transferee, Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp.*, Memorandum Opinion and Order, 21 FCC Rcd. 7368, ¶¶ 31-33 (2006) ("Finally, it is useful to contrast the nature of competitive rivalry in *retail* satellite service markets, where customers are ordinary consumers buying, for example, multi-channel video programming services, and wholesale satellite service markets, where customers are business entities buying video transmission services by satellite for either contribution or distribution purposes. . . . Given the significant structural and behavior differences between retail and wholesale satellite services markets, different models of competitive rivalry apply.") (emphasis in original).

[55] *See European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services*, 2002 Official Journal of the European Communities (C 165/03), ¶ 67.

wholesale services does not preclude the possibility that there is competition in the provision of downstream retail services, because downstream competitors often do not offer their transmission facilities at wholesale. Conversely, the absence of competition in the downstream retail market does not preclude the possibility that there is competition in the provision of upstream wholesale inputs, because providers of loop and transport facilities might not compete in the provision of one or more of the relevant downstream retail products.

Accordingly, under the Proposed Standard, the FCC would separately assess the wholesale and retail markets. When applying the Wholesale Test of the Proposed Standard, the FCC would examine the relevant markets for wholesale loop inputs. That is, the FCC would assess the extent to which competitors with their own loop and transport facilities offer at wholesale substitutes for unbundled DS0 loops, conditioned copper loops, DS1 loops, DS3 loop, DS1 transport, and DS3 transport facilities. When applying the Retail Test of the Proposed Standard, the FCC would examine the relevant markets for retail services that are provided using UNE loop inputs. That is, the FCC would assess the extent to which competitors with their own loop and transport facilities use those facilities to offer substitutes for downstream retail services that competitors provide *via* UNEs. Such downstream retail services include, for example, voice service, xDSL service, and Ethernet service.

Furthermore, within the retail market, the FCC should recognize the inherent differences in services demanded by and sold to residential customers and small business customers. *First*, competitors' practices for marketing and advertising to small business customers are different than would be the case if they sought to acquire residential customers.[56] Service providers targeting residential customers rely on mass marketing to offer various service plans and bundles that are not generally customizable.[57] As explained in the attached declarations by high-level executives at One Communications and Integra, however, both companies rely on direct sales representatives to conduct face-to-face consultations and on-site visits with prospective business customers—even the smallest business customers—to proactively determine their telecommunications needs and design individualized solutions to meet those needs.[58]

Second, competitors such as One Communications and Integra provide more proactive and personalized customer service to their business customers than they would if they served residential customers. For instance, One Communications and Integra dedicate account managers to every customer with an average monthly bill of at least $500, and those account managers proactively contact customers multiple times per year to assess their ongoing

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[56] *See* Declaration of Randy Ritter & Jill Fritz on Behalf of One Communications Corp., ¶ 4 ("Ritter-Fritz Declaration") (attached hereto as Attachment C); Declaration of Steve Anderson & Jason Mocca on Behalf of Integra Telecom, Inc., ¶ 4 ("Anderson-Mocca Declaration") (attached hereto as Attachment D).

[57] *See* Ritter-Fritz Declaration ¶ 5; Anderson-Mocca Declaration ¶ 5.

[58] *See* Ritter-Fritz Declaration ¶ 5; Anderson-Mocca Declaration ¶ 5.

communications needs.[59] Even the smallest business customers (*i.e.*, those with average monthly bills under $500) demand a level of care that is superior to that demanded by residential customers.[60] In particular, businesses of all sizes generally demand that service problems be detected and resolved more quickly and efficiently than residential customers.[61] Therefore, One Communications and Integra employ enough call center employees to ensure average call speeds that are faster than would be the case for residential customers, and they maintain certain practices to provide personalized customer care even in the call center environment.[62] Carriers such as One Communications and Integra also employ numerous operating practices to proactively monitor their networks and detect and resolve service problems in shorter repair intervals.[63]

Third, competitors that serve only business customers must design their networks differently than would be the case if they served residential customers. As explained by executives in One Communications' and Integra's engineering and operations departments, carriers must allocate more capacity on the shared portions of their telephone and data networks to accommodate business customers' higher usage levels.[64] These companies must also build higher levels of redundancy in their networks to meet even the smallest business customers' demands for greater reliability and lower tolerance for service outages.[65]

Fourth, the service features and characteristics demanded by and marketed to even the smallest business customers are qualitatively different from those demanded by and marketed to

[59] *See* Ritter-Fritz Declaration ¶¶ 9-10; Anderson-Mocca Declaration ¶¶ 9-10. These companies provide this level of service for each location of a business customer that meets the average monthly bill threshold, even those locations to which they provide only basic telephone service. *See id.* ¶ 10.

[60] *See* Ritter-Fritz Declaration ¶ 12; Anderson-Mocca Declaration ¶ 12

[61] *See* Declaration of David Charbonneau & Aaron Bruneau on Behalf of One Communications Corp., ¶ 10 ("Charbonneau-Bruneau Declaration") (attached hereto as Attachment E); Declaration of Dave Bennett & Steve Fisher on Behalf of Integra Telecom, Inc., ¶ 9 ("Bennett-Fischer Declaration") (attached hereto as Attachment F).

[62] *See* Ritter-Fritz Declaration ¶ 12; Anderson-Mocca Declaration ¶ 12 ("For example, in Oregon, Integra assigns a subset of its call center employees directly to customer accounts under $500 in certain circumstances, such as when a customer has been experiencing ongoing service problems.").

[63] *See* Charbonneau-Bruneau Declaration ¶¶ 10-15 (explaining that, among other things, One Communications conducts "remote testing, monitoring, and troubleshooting for all of its business customers, including its smallest business customers"); Bennett-Fisher Declaration ¶¶ 9-13.

[64] *See* Charbonneau-Bruneau Declaration ¶¶ 6-7; Bennett-Fisher Declaration ¶ 6.

[65] *See* Charbonneau-Bruneau Declaration ¶ 8; Bennett-Fisher Declaration ¶ 7.

residential customers. The voice service offerings available to small business and residential customers reflect this difference in demand.[66] For example, based on research conducted by One Communications' Director of Pricing Strategy and Product Operations, Daniel Hewitt, and Integra's Vice President of Product Development and Marketing, Trent Anderson, service providers offer certain calling features to small business customers that they either do not offer or do not market on their websites to residential customers.[67] These include call hunting, call transfer, and remote call forwarding.[68]

Likewise, the features of the data services offered to small businesses are qualitatively different from the features of data services offered to residential customers.[69] As explained by Messrs. Hewitt and Anderson, service providers typically offer features with their Internet access service for small businesses that are designed to increase such businesses' productivity and efficiency and offer increased security and reliability.[70] By contrast, service providers tend to offer residential customers features that enable residential customers to, among other things, view and share photos, videos, games, music, and other entertainment content.[71]

Fifth, according to Mr. Anderson, "[t]he differences in the levels of customer service and the features offered to residential and small business customers are reflected in the prices of these services."[72] For instance, the prices of voice service plans for small businesses are generally higher than voice service plans for residential customers that include a similar number or fewer number of features.[73] Providers also often charge significantly higher rates for basic broadband services provided to small business customers than those provided to residential customers, even for service at the same maximum download speeds.[74]

These higher prices are unsurprising given that carriers serving business customers, including the smallest business customers, incur substantial costs in the areas of customer

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[66] *See* Declaration of Daniel Hewitt on Behalf of One Communications Corp., ¶ 6 ("Hewitt Declaration") (attached hereto as Attachment G).

[67] *See id.* ¶ 6; Declaration of Trent Anderson on Behalf of Integra Telecom, Inc., ¶ 6 ("T. Anderson Declaration") (attached hereto as Attachment H).

[68] *See* Hewitt Declaration ¶ 6; T. Anderson Declaration ¶ 6.

[69] *See* Hewitt Declaration ¶ 5; T. Anderson Declaration ¶ 5.

[70] *See* Hewitt Declaration ¶ 5; T. Anderson Declaration ¶ 5.

[71] *See* Hewitt Declaration ¶ 5; T. Anderson Declaration ¶ 5.

[72] T. Anderson Declaration ¶ 8.

[73] *See* Hewitt Declaration ¶ 8; T. Anderson Declaration ¶ 8.

[74] *See* Hewitt Declaration ¶ 8; T. Anderson Declaration ¶ 8.

acquisition,[75] network design and engineering,[76] and customer care[77] that they likely would not incur if they served residential customers. According to Messrs. Hewitt and Anderson, because of the differences in the telephone and Internet access service offerings available to residential and business customers, and the way in which these services are marketed, it is unlikely that small business customers would switch to residential telephone and Internet access services if providers increase the prices of small business telephone and Internet access services.[78] In light of all of these differences, under the Proposed Standard, basic voice and broadband services sold to residential customers belong to different product markets than voice and broadband services sold to small business customers.

The Proposed Standard does not foreclose further disaggregation of product markets. In certain circumstances, it may well make sense for the FCC to differentiate among the products sold to residential customers and among the products sold to business customers. This would be the case, for example, where levels of competition among the products offered to business customers are significantly different, and a petitioner for forbearance has demonstrated that competition in the MSA for one or more wholesale or retail products sold to business customers is near the threshold established in the Proposed Standard.

C. Identifying Competitors For Purposes Of The Proposed Standard.

It is critical that the FCC establish clear criteria for identifying the firms that should be "counted" as competitors under the Proposed Standard. Under the Wholesale Test and the Retail Test, a facilities-based non-ILEC competitor must be a *wireline* competitor in order to qualify as a competitor because mobile wireless voice and data services are not substitutes for wireline voice and data services. As the Joint Commenters have explained at length in their filings in several UNE forbearance proceedings, mobile wireless voice service does not belong in the same product market as residential wireline telephone service.[79] But even if mobile wireless service

[75] *See* Ritter-Fritz Declaration ¶ 8; Anderson-Mocca Declaration ¶ 8.

[76] *See* Charbonneau-Bruneau Declaration ¶ 9; Bennett-Fisher Declaration ¶ 8.

[77] *See* Charbonneau-Bruneau Declaration ¶ 17; Bennett-Fisher Declaration ¶ 14; Ritter-Fritz Declaration ¶¶ 11-12; Anderson-Mocca Declaration ¶¶ 11-12.

[78] *See* Hewitt Declaration ¶¶ 5-6; T. Anderson Declaration ¶¶ 5-6.

[79] *See, e.g.,* Letter from T. Jones, Counsel for One Communications Corp. et al., to Marlene H. Dortch, Secretary, FCC, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24, at 7-9 (filed Dec. 3, 2008) ("Joint Commenters' December 3, 2008 Rhode Island *Ex Parte* Letter"); Letter from T. Jones, Counsel for Cbeyond, Inc., et al., to Marlene H. Dortch, Secretary, FCC, *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Dkt. No. 07-97, at 2-10 (filed May 7, 2008); *see generally* K. Mikkelsen, "Mobile Wireless 'Cut the Cord' Households in FCC Analysis of Wireline Competition," Apr. 21, 2008, *In re Petitions of Qwest Corporation for*

belongs in the same product market as wireline service marketed to residential customers, no petitioner for forbearance from unbundling obligations has ever shown that there is any basis for concluding that mobile wireless voice service belongs in the same product market as wireline voice service marketed to *business* customers.[80] Moreover, no such petitioner has demonstrated that there is any basis for concluding that mobile wireless *data* services belong in the same product market as residential wireline data services, let alone business wireline data services.

Furthermore, under the Wholesale Test of the Proposed Standard, each facilities-based non-ILEC wireline competitor must have *actually deployed* end-user connections to 75 percent of the relevant end-user locations in an MSA. This network coverage requirement is necessary because, as explained in the attached Oliver and Robinson Declarations, in order for CLECs such as One Communications and Cbeyond to rely on a wholesale provider of loops, the provider must generally be able to serve all of the locations that One Communications and Cbeyond provide service.[81] According to Messrs. Oliver and Robinson, this is because the transaction costs associated with establishing and maintaining multiple wholesale relationships are generally too high for their companies to rely on multiple wholesale loop providers in a given geographic area.[82]

In addition, under the Wholesale Test, each facilities-based non-ILEC wireline competitor must have deployed wholesale operations support systems ("OSS"), including systems that allow for electronic bonding, to accommodate the wholesale demand in the relevant product market. As the Commission has held in the past, sufficiently developed OSS is essential to the availability of wholesale offerings.[83] Moreover, as explained by Messrs. Oliver and Robinson, in order for One Communications and Cbeyond to rely on a wholesale provider of loops, the provider must have fully developed OSS such that they can accomplish ordering,

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Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle MSAs, WC Dkt. No. 07-97 (filed Apr. 22, 2008).

[80] Notably, as explained by Broadview Networks et al., Verizon has failed to include mobile wireless services as a source of competition in the business market in its pending forbearance petitions. *See* Letter from G. Morelli, Counsel for Broadview Networks et al., to Marlene H. Dortch, Secretary, FCC, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24 et al., n.16 (filed Apr. 3, 2009) (citing Verizon Rhode Island Petition at 26-30 and Verizon Virginia Beach Petition at 26-31).

[81] *See* Oliver Declaration ¶ 10; Robinson Declaration ¶ 9.

[82] *See* Oliver Declaration ¶ 10; Robinson Declaration ¶ 8.

[83] *See, e.g.*, *Local Competition Order* ¶ 516 (finding that OSS is essential to promote viable competitive entry); *see id.* ¶ 518 ("Much of the information maintained by these systems is critical to the ability of other carriers to compete with incumbent LECs using unbundled network elements or resold services.").

provisioning, monitoring, maintenance, repair and billing in a timely and cost-effective manner.[84]

Under the Retail Test, at least 75 percent of end-user locations must be served by two or more facilities-based non-ILEC wireline competitors using loops that the competitors have actually deployed. This network coverage requirement takes into account the demand patterns of retail customers and ensures that most retail customers have at least two competitors from which to purchase service in the relevant product market.

Finally, under both the Wholesale Test and the Retail Test, each competitor must have captured at least 15 percent of the market share in the relevant product market. This market share requirement ensures that a competitor in the relevant product market is a viable competitor that has achieved some modest success among the relevant customers.

D. Under The Proposed Standard, Forbearance Would Only Be Granted Where The Incumbent LEC Faces Competition From *At Least Two* Qualifying Competitors In The Relevant Product Market.

It is critical that the FCC deny forbearance where the post-forbearance market structure would be a duopoly. Otherwise, there is a substantial risk that prices in post-forbearance markets would be set at supra-competitive levels.[85] This conclusion is firmly rooted in antitrust law and principles. Moreover, supra-competitive prices would result in dead-weight losses to consumer welfare.[86] For this reason, under the Proposed Standard, forbearance would not be granted in a market unless and until two sufficiently viable facilities-based competitors have entered the market.

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[84] *See* Oliver Declaration ¶ 9; Robinson Declaration ¶ 7.

[85] *See* PHILIP E. AREEDA, ET AL., ANTITRUST LAW ¶ 925(c) (2d ed. 2006) ("*Areeda 2d ed*.") ("On almost every assumption about the type of oligopoly behavior, price increases to levels significantly above cost are highly likely in such markets. Thus, significant mergers in such markets would bear a strong presumption of illegality. Markets reducing the number of 'significant' firms from four to three, or from five to four, typically fall into this classification.").

[86] Even the presence of three competitors in many instances does not produce prices that would prevail in a fully competitive market. In fact, in many markets, six to ten competitors are necessary to achieve that result. *See Areeda 2d ed.* ¶ 927(a) ("[O]ne reasonable and fairly general conclusion is that noncompetitive pricing in a market for a homogeneous product is unlikely to occur when there are more than six to ten equivalent sellers. . . . This would be the equivalent of a[n] [HHI] reading in the 1000-1800 range . . . . By contrast, when the HHI exceeds 1800[,] . . . the danger of noncompetitive pricing is likely to increase."). Therefore, the Proposed Standard, which eliminates the incumbent LECs' duty to provide UNEs only if there are three facilities-based wireline competitors in a market, is conservative because a grant of forbearance based on the existence of three competitors in a market does not necessarily eliminate the risk that prices would remain above competitive levels.

1. Antitrust Doctrine Condemns Mergers To Duopoly In Markets With Similar Characteristics As The Markets At Issue In The Rhode Island Forbearance Proceeding.

Merger analysis conducted under antitrust law is a helpful guide to assessing the effects of different market structures on prices because antitrust law is the main vehicle by which the government analyzes the harms arising from market concentration, including duopoly.[87] The economics of merger analysis teach that the harms arising from concentrated markets cannot be measured mechanically from the application of one theory or another. For this reason, courts, as well as the FTC and FCC, examine the overall harms that may result from market concentration to determine whether governmental intervention is appropriate. Nevertheless, it is analytically useful to consider two ways in which a post-forbearance duopoly market structure would make it more likely that supra-competitive prices would result: (1) through the unilateral conduct of one or both of the remaining market players; or (2) through coordinated interaction of the two remaining market players.

a. Unilateral Conduct

There is a substantial risk that an incumbent LEC could unilaterally increase prices to supra-competitive levels in many or most markets in which the incumbent LEC receives forbearance in a market in which it faces only a single facilities-based competitor.[88] The *DOJ-FTC Horizontal Merger Guidelines* state that there is an increased likelihood of unilateral price increases once a merged firm selling a homogenous product obtains at least a 35 percent market share and other market characteristics indicate that non-merging firms could not expand output sufficiently to frustrate an effort to increase prices.[89] The conditions facilitating unilateral conduct are clearly met in Rhode Island if Verizon is left to compete against a single facilities-based competitor.

First, if the relevant Rhode Island markets are served by a facilities-based duopoly, it is a mathematical certainty that one firm, if not both firms, will exceed the 35 percent market share threshold. For example, Verizon could have 80 percent market share in a particular market and the second provider could have 20 percent market share. In that case, Verizon would retain an overwhelmingly dominant share of the market, increasing the risk that Verizon would

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[87] In a subsequent filing, the Joint Commenters will submit a declaration from economists which discusses in more detail the harms to consumer welfare likely to occur in duopoly markets.

[88] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 0.1 (Apr. 2, 1992, revised Apr. 8, 1997) ("*DOJ-FTC Horizontal Merger Guidelines*") ("Circumstances also may permit a single firm, *not a monopolist,* to exercise market power through unilateral or non-coordinated conduct--conduct the success of which does not rely on the concurrence of other firms in the market or on coordinated responses by those firms.") (emphasis in original).

[89] *See DOJ-FTC Commentary on the Horizontal Merger Guidelines*, at 26-27 (Mar. 2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.pdf ("*DOJ-FTC Commentary*").

unilaterally raise prices.[90] If Verizon had 55 percent market share and the other facilities-based competitor had 45 percent market share, both firms would meet the 35 percent threshold, increasing the risk that Verizon *and* the other firm would act unilaterally to raise prices.

Second, the products sold by Verizon and competitors in Rhode Island are homogenous. Cox's consumer cable modem and Verizon's consumer DSL service provide essentially the same features at similar prices: asymmetrical broadband Internet access service without service level agreements.[91] Moreover, Cox markets its consumer voice service as just as reliable and feature rich as the incumbent LEC's phone service.[92] Verizon's and its competitors' business transmission services (*i.e.*, DS1 and DS3) are even more homogenous. DS1 and DS3 services are based on defined standards established decades ago by Bell Labs.[93] These services offer set bandwidths (1.544 Mbps for a DS1 and 44.736 Mbps for a DS3) and fixed feature sets. For example, a DS1 always contains 28 64-kbps channels that can be utilized for voice or data.[94]

Third, given the substantial barriers to entry, it is unlikely that other firms would be able to quickly enter or rapidly expand capacity on an MSA-wide basis to prevent the two remaining firms from unilaterally increasing their prices. As the FCC, DOJ, and GAO have found, this is

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[90] The FCC has often looked to market share as a primary indicator of whether a firm is dominant and therefore able to unilaterally raise prices. *See* 47 C.F.R. § 61.3(q) (defining a "dominant carrier" as "[a] carrier found by the Commission to have market power (*i.e.*, power to control prices)"). All other things being equal, the higher a firm's market share, the more likely it will be able to unilaterally increase prices. *See In re Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 F.C.C.2d 1, ¶ 62 (1980) ("AT&T, including its 23 associated telephone companies and its Long Lines Department, dominates the telephone market by any method of classification. Currently, the Bell System controls access to over 80% of the nation's telephones. Since many of AT&T's competitors must have access to this network if they are to succeed, AT&T possesses control of bottleneck facilities. Therefore, we believe that AT&T must be treated as dominant.").

[91] *See* Attachment 1 to Hewitt Declaration.

[92] *See* Cox Communications, http://ww2.cox.com/residential/rhodeisland/phone/answers-about-phone.cox (last visited Apr. 6, 2009) ("What is Cox phone service? Cox phone is the same primary line telephone service you've known for years inside your home. Cox owns and operates a privately managed network to send and receive calls."); *see id*. (discussing standard features of Cox's residential phone service).

[93] *See* NEWTON'S TELECOM DICTIONARY 273 (20th ed. 2004) (explaining the origins of the DSx standard and the capacities of DS0, DS1, and DS3 services).

[94] *See id.*

particularly true with respect to the market for business transmission services (*i.e.*, DS1s and DS3s), in which facilities-based entry is extremely difficult.[95]

b. Coordinated Interaction

If forbearance were granted based on the presence of only a single facilities-based competitor to the incumbent LEC, there is an increased risk that the incumbent LEC and the competitor will engage in coordinated action to charge supra-competitive prices. It is well established that high market concentration can facilitate express or tacit collusion (or "coordination" or "coordinated interaction") to increase prices to supra-competitive levels.[96] To begin with, a smaller number of competitors can more easily negotiate and sustain consensus on price, output, and other terms.[97] Fewer competitors can also more readily detect and punish

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[95] *See TRRO,* ¶¶ 148-154 (finding that it is almost always uneconomical for competitive carriers to deploy DS1s or DS3s); *see also* Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-08, at 12 (Nov. 2006) (finding that competitive providers deployed facilities to only six percent of commercial buildings with demand of a DS1 or greater and 15 percent of commercial buildings with a DS3 of demand or greater in the 16 markets studied); Compl., *United States v. SBC Communications, Inc. and AT&T Corp.*, No. 1:05-CV-02102, ¶ 15 (D.D.C. Oct. 27, 2005) (finding that "[f]or the vast majority of commercial buildings in its territory, SBC [now AT&T] is the only carrier that owns a last-mile connection to the building"); Compl., *United States v. Verizon Communications Inc. and MCI, Inc.*, No. 1:05-CV-02103, ¶ 15 (D.D.C. Oct. 27, 2005) (finding that "[f]or the vast majority of commercial buildings in its territory, Verizon is the only carrier that owns a last-mile connection to the building").

[96] *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 9.05a (3d ed. Supp. 2006) ("[T]here is general agreement that an undue reduction in the number of competing sellers or undue concentration of sales in the hands of a few relatively large sellers is likely to lead to noncompetitive pricing, either through recognized interdependence or actual collusion or both."). It should be noted that the terms of coordination "need not be perfect." *DOJ -FTC Commentary* at 19. For example, coordinated interaction can "yield elevated prices short of monopoly levels . . . and still result in significant competitive harm." *DOJ-FTC Horizontal Merger Guidelines* § 2.11. Modern economic theory shows that what is often characterized as "tacit collusion" need not involve coordinated expectations or threats of *punishment* for deviations, merely a recognition that firms will respond to price initiatives. *See* Eric Maskin and Jean Tirole, *A Theory of Dynamic Oligopoly, I: Overview and Quantity Competition With Large Fixed Costs*, 56 ECONOMETRICA 543, 553 (1988).

[97] *See, e.g., DOJ-FTC Commentary* at 20 ("The number of rival firms remaining after a merger, their market shares, and market concentration are relevant factors in determining the effect of a merger on the likelihood of coordinated interaction. The presence of many competitors tends to make it more difficult to achieve and sustain coordination on competitive terms and also reduces the incentive to participate in coordination"); *see also* Andrew R. Dick, *Coordinated Interaction: Pre-Merger Constraints and Post-Merger Effects*, 12 GEO. MASON L. REV. 65, 71 (2003); RICHARD A. POSNER, ANTITRUST LAW 63 (2d ed. 2001).

deviations from the terms of coordination, thereby increasing the likelihood of successful coordination.[98] It follows that the elimination of actual or potential competitors (*i.e.*, those that rely on UNEs) as a result of forbearance "will make it at least incrementally easier for the remaining suppliers to collude."[99]

While market concentration is likely the most significant factor that facilitates coordination among competitors, other factors also increase the likelihood of coordinated interaction. While the presence or absence of any particular characteristic is not dispositive, among the many market conditions that may facilitate coordination are as follows: (1) the firms' pricing information is readily available;[100] (2) the firms' products and services are homogenous or "standardized";[101] and (3) the market(s) at issue have high entry barriers.

It is likely that these factors are present in most, if not all, of the Rhode Island product markets at issue. *First*, pricing information is readily available from both incumbent LECs and competitors. As indicated by Attachment 1 to the Hewitt Declaration, incumbent LECs' and competitors' prices for residential broadband and voice service are readily available from their respective websites. Similarly, with respect to the business market, Verizon's DS1 and DS3 prices are listed in public tariffs. *Second*, as explained above, the incumbent LECs' and competitors' products sold to business and residential customers are relatively "homogenous" or standardized. *Third*, as discussed above, there are high barriers to entry in the consumer broadband and business transmission markets, making MSA-wide entry difficult.

2. The FCC, DOJ, And The Courts Have Found That Duopolies Often Result In Substantial Competitive Harms And Supra-Competitive Prices.

The FCC, DOJ, and the courts have all recognized that, at a minimum, three facilities-based competitors are necessary to prevent the harms resulting from potential unilateral or collusive conduct in duopoly markets. The FCC has observed that "existing antitrust doctrine

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[98] *See, e.g.,* Dick at 71-72; *see also* POSNER at 63.

[99] Dick at 72.

[100] *See, e.g., DOJ-FTC Commentary* at 18 ("Coordination on prices tends to be easier the more transparent are rivals' prices . . . ."); Dick at 84.

[101] *See, e.g., DOJ-FTC Horizontal Merger Guidelines* § 2.1; AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 404(c)(3) (3d ed. 2007) ("Product complexity, differentiation, or variety greatly impedes oligopolistic coordination[]" because "they multiply avenues of rivalry and hence the decisions that must be coordinated."); Dick at 75 (explaining that the more differentiated products are, the more difficult it will be to punish deviations from the terms of coordination "because suppliers will need to cut their price drastically in order to force a given sized reduction in a cheater's sales"); *see also* POSNER at 76 ("The absence of . . . pricing manuals is also . . . evidence that the industry is producing a custom product in the sense relevant to the feasibility of collusion.").

suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."[102] For this reason, the FCC rejected the proposed transaction to combine the two major DBS providers in the United States, EchoStar and DirectTV, into a single entity.[103] In the *DirecTV-EchoStar Merger Order,* the Commission further recognized that courts "have generally condemned mergers that result in duopoly. . . ."[104] Similarly, the DOJ and FCC found that the cellular duopoly in the mid-1980s to mid-1990s resulted in prices substantially above competitive levels.[105] This conclusion was shared by many leading academics.[106] In addition, prices

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[102] *In re Application of EchoStar Communications Corporation et al.*, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 103 (2002) ("*DirecTV-EchoStar Merger Order*") (citing IV PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW, ¶ 932 at 160 (Rev. ed. 1998)) ("No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized.").

[103] *See generally DirecTV-EchoStar Merger Order.*

[104] *Id.* ¶ 100; *see id.*, n.305 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001)) ("In *FTC v. H.J. Heinz Co.*, [the appeals court] rejected the district court's finding that the merger of the second and third largest firms in a three-firm baby-food market would increase the ability of the merged firm to compete with the number one firm. Noting the district court's finding that 'there had been no significant entries in the baby-food market in decades and that new entry was 'difficult and improbable,' the court of appeals stated that '[a]s far as we can determine, no court has ever approved a merger to duopoly under similar circumstances.'").

[105] *See* Statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, United States Department of Justice, Submitted to the Subcommittee on Oversight and Investigations, United States House of Representatives, On Competition in the Cellular Telephone Service Industry, Oct. 12, 1995, at 3 *available at* http://www.usdoj.gov/atr/public/testimony/0460.htm ("Economic theory and experience teach that markets with only two competitors and legal barriers preventing additional entry will result in only limited competition. This is consistent with the Department's experience in the wireless markets. The Department has consistently voiced strong concerns over the cellular duopoly structure -- even before this structure was created. We continue to believe that the markets for wireless telephone service, as controlled by the cellular duopolists in each area, are not fully competitive and that these markets need additional wireless service providers in order to become adequately competitive."); *In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Report, 10 FCC Rcd 8844, ¶ 4 (1995) ("The duopoly nature of cellular service made it less than fully competitive[]. Therefore, in the early 1990s, the Commission allocated 143 MegaHertz ('MHz') of spectrum, almost three times the spectrum allocation for cellular service, to create Personal Communications Services ('PCS'). . . . [T]he Commission's [broadband PCS] spectrum allocation [also] provides sufficient spectrum to ensure at least three, and possibly as many as six, new competitors to the cellular carriers in each market.").

[106] *See, e.g.,* Heli Koski & Tobias Kretschmer, *Regulation and Market Evolution in 2G Telecommunications Markets: Some Observations,* 49 COMMUNICATIONS & STRATEGIES NO. 67,

remained stable as cellular industry costs declined, a recognized indicator of the exercise of market power.[107] The arrival of multiple PCS competitors in the mid-1990s substantially reduced prices closer to competitive levels.[108]

Likewise, the FCC has repeatedly held that fully functioning, competitive markets require at least three *facilities-based* competitors of relatively equal size to prevent public interest harms in retail and wholesale markets. *First*, in the *AT&T Non-Dominance Order*, the FCC found that elimination of dominant carrier regulation for AT&T's long distance service was appropriate because there were a total of three facilities-based carriers with substantial networks (*i.e.*, MCI, AT&T and Sprint) in the market.[109] *Second*, in the *AT&T-Cingular Merger Order*, the FCC held that "the [proposed] transaction would almost certainly be harmful to competition if it resulted in a reduction in the number of rival carriers from 2 to 1, or 3 to 2."[110] *Third*, in the *Sprint-Nextel Merger Order*, the FCC approved the merger and found that "there are no [Component

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75 (2003) ("The wireless duopoly has resulted in substantially higher average prices. In fact, in 1995 the average peak call prices in monopolistic markets were lower than in duopoly markets. Previous work . . . suggests that the presence of two competitors in the market may not reduce prices as much as competition between more than two firms."); *see also* Harald Gruber, *Competition and innovation: The diffusion of mobile telecommunications in Central and Eastern Europe*, 13 INFORMATION ECONOMICS AND POLICY 19, 32 (2001) ("The present study provides further support for the view that more than two firms may be needed to significantly accelerate the diffusion of mobile telecommunications.").

[107] *See* HARALD GRUBER, THE ECONOMICS OF MOBILE TELECOMMUNICATIONS 203 (2005) ("Prices remained remarkably constant in nominal terms over the second half of the 1980[s], in spite of technological developments that led to general reductions in cost. Other studies confirm that at that time duopoly market structure gave little incentives to lower prices.").

[108] *See In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 et al.*, Fifth Report, 15 FCC Rcd 17660, at 18-19 (2000) ("As the Commission observed in the previous two reports, it is difficult to identify sources of information that track mobile telephone prices in a comprehensive manner. However, a number of reports and other available data indicate that the entrance of new competitors into this market continues to reduce prices. Because these studies use different methodologies and market samples, their findings vary and are comparable only in the broadest terms. Nevertheless, they clearly show that the average price of mobile telephony has fallen substantially since the *Fourth Report*, continuing the trend of the last several years.").

[109] *See AT&T Non-Dominance Order* ¶¶ 140-42.

[110] *In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 193 (2004) ("*AT&T-Cingular Merger Order*").

Economic Areas] in which the merger would reduce the number of competitors to two or fewer, a merger consequence that [it] would view as presenting a likelihood of competitive harm."[111]

For these reasons, it is sound policy to deny forbearance in markets where the incumbent LEC faces only a single facilities-based competitor. Accordingly, under the Proposed Standard, an incumbent LEC would only be eligible for forbearance in a market in which two or more facilities-based competitors offer substitute services to those offered by the incumbent.[112]

III. THE PROPOSED STANDARD APPLIED TO VERIZON'S RHODE ISLAND FORBEARANCE PETITION.

It is not possible to apply the Proposed Standard fully to the instant forbearance petition without access to confidential network coverage and market share data from the incumbent cable operator in Rhode Island, Cox.[113] However, even without such information, it is clear that Verizon's petition for forbearance in Rhode Island should be denied under the Proposed

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[111] *Sprint-Nextel Merger Order* ¶ 119.

[112] If the FCC decides to grant forbearance based on the presence of a single facilities-based competitor, it is critical that the FCC establish appropriate post-forbearance regulations to ensure that the public interest is not harmed. The Commission should follow the logic of its *Anchorage Order* and impose conditions on forbearance grants, as needed, to limit the likelihood that consumers would be required to pay supra-competitive prices post-forbearance. Specifically, the FCC should establish a presumption that, in any MSA in which forbearance is granted based on the presence of a single facilities-based competitor, the FCC will condition its grant of forbearance on the incumbent LEC's continued obligation to offer unbundled loops at rates subject to meaningful post-forbearance rate regulation. Such rate regulation would apply to both RBOCs and incumbent LECs that are not RBOCs. *See Anchorage Order* ¶ 39 ("Until such a commercial agreement is reached, we require ACS to provide loop access at the same rates, terms, and conditions negotiated between ACS and GCI in Fairbanks, Alaska for loop and subloop access."); *see id.* n.133 ("Under the terms agreed to between ACS and GCI, the rate in Fairbanks for a DS0 loop is $23.00 (compared to the Anchorage UNE rate of $18.64), and the rate for a DS1 loop is $87.93 (compared to the Anchorage UNE rate of $86.23).").

[113] The Joint Commenters will submit a more complete analysis of Verizon's pending Rhode Island forbearance petition under the Proposed Standard after Cox submits network coverage and market share data in the record. The Joint Commenters will also submit an analysis of Verizon's pending petition for forbearance in Cox's service territory in the Virginia Beach MSA (*see* Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 08-49 (filed Mar. 31, 2008)) under the Proposed Standard after Cox submits the relevant network coverage and market share data in WC Dkt. No. 08-49. In light of the upcoming May 15, 2009 statutory deadline for the Commission to act on Verizon's Rhode Island forbearance petition, however, Joint Commenters have limited the instant discussion to Rhode Island.

Standard.[114] *First*, Verizon could not demonstrate that the Wholesale Test is satisfied. There is no basis for concluding that Cox could be one of the two required facilities-based non-ILEC wireline competitors in the wholesale loop market because there is no evidence that Cox has sufficient OSS to support the wholesale demand in the relevant product market. Indeed, One Communications' Executive Vice President of Strategy, Russell Oliver, has stated that he is "not aware of any non-incumbent ILEC provider of wholesale loop facilities in Rhode Island that has deployed sufficient OSS capabilities to enable One Communications to rely on that wholesale provider to offer downstream retail services."[115] Moreover, even if Cox qualified as one of the two competitors required to satisfy the Wholesale Test, there is no evidence that there is a second facilities-based non-ILEC wireline competitor in Rhode Island that meets the criteria of the Wholesale Test.

Second, Verizon could not demonstrate that the Retail Test of the Proposed Standard is satisfied. There is no basis for concluding that 75 percent of end-user locations in Rhode Island are served by two facilities-based non-ILEC *wireline* competitors in any of the downstream retail product markets. Accordingly, Verizon's petition for forbearance in Rhode Island should be denied.

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[114] The FCC need not address Verizon's failure to file its petitions for forbearance in Rhode Island and Virginia Beach on an MSA basis because, as Joint Commenters have explained, there is ample basis for rejecting those petitions on other grounds. *See generally* Opposition of One Communications Corp. et al., *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24 (filed Mar. 28, 2008); Opposition of Cbeyond, Inc. et al., *In re Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Dkt. No 08-49 (filed May 13, 2008); Joint Commenters' December 3, 2008 Rhode Island *Ex Parte* Letter. In the future, however, the FCC should reject as facially deficient incumbent LEC UNE forbearance petitions that are not filed on an MSA basis, absent extraordinary circumstances justifying a different approach.

[115] Oliver Declaration ¶ 9.